APPENDIX A- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT FILED DECEMBER 29, 1997

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RESEARCH TRIANGLE INSTITUTE,
Plaintiff-Appellant,
v.
The BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
consisting of
Alan Greenspan in his official capacity as chairman, and Edward W. Kelley, Jr., Lawrence B. Lindsey, Susan M. Phillips and Janet L. Yellen in their capacities as members of the Board of Governors; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 97-1282.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., Chief District Judge.
(CA-96-102-1)

Argued: Oct. 30, 1997.
Decided: Dec. 29, 1997.

Before RUSSELL, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by published opinion, Judge Russell wrote the opinion, in which Judge Niemeyer and Judge Williams joined.

COUNSEL

ARGUED: Robinson Oscar Everett, Everett & Everett, Durham, NC, for Appellant. Bradford Scott Fleetwood, Senior Attorney, Washington, DC, for Appellee Board of Governors; Gill Paul Beck, Assistant United States Attorney, Greensboro, NC, for Appellee United States. ON BRIEF: Sandra G. Herring, Everett & Everett, Durham, NC, for Appellant. James V. Mattingly, Jr., General Counsel, Richard M. Ashton, Associate General Counsel, Katherine H. Wheatley, Assistant General Counsel, Washington, DC, for Appellee Board of Governors; Walter C. Holton, Jr., United States Attorney, Greensboro, NC, for Appellee United States.

OPINION

RUSSELL, Circuit Judge:

This appeal presents a single question of law: whether the Board of Governors of the United States Federal Reserve System (the "Board") can be sued in contract in federal court. The district court found that the doctrine of sovereign immunity shielded the Board from contract suits in federal court and dismissed this case for lack of subject matter jurisdiction. Because we can find neither an express waiver of sovereign immunity in the Board's governing statutes nor the Board's inclusion in a more general Congressional waiver of immunity, we agree with the district court's finding, and affirm its dismissal of the case.

I.

A.

Appellant Research Triangle Institute ("RTI") is a nonprofit scientific research organization headquartered in Research

Triangle Park, North Carolina. RTI sued the Board in the United States District Court for the Middle District of North Carolina, seeking reimbursement for unforeseen costs incident to a contract that required RTI to perform a survey of the institutions and geographic areas from which small businesses obtain financial services. The fixed contractual price for RTI's services was $572,763, but in May of 1989, nearly a year after the contract was awarded, RTI sought an equitable adjustment in the amount of $284,079. The Board denied the adjustment in February 1990, and RTI brought suit. On February 14, 1997, the district court dismissed the case for lack of subject matter jurisdiction.[1] This appeal followed.

B.

> As stated above, the district court dismissed this case for lack of subject matter jurisdiction based on its finding that the doctrine of sovereign immunity protected the Board from suit. Because the existence of sovereign immunity is a question of law, we review this determination de novo.[2]

With regard to the federal government and its instrumentalities, sovereign immunity is presumed and cannot be overcome without an express and unequivocal statutory waiver.[3] Further, any statutory waiver is strictly construed,

---

[1]Research Triangle Inst. v. Board of Governors, 962 F.Supp. 61 (M.D.N.C.1997).

[2]Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir.1994).

[3]Lane v. Pena, 116 S.Ct. 2092, 2096, (1996).

with all ambiguities resolved in favor of the sovereign.[4]

The jealous protection of the sovereign from suit is deeply rooted in the common law[5] and has been considered a part of the plan of our Constitution since before its ratification. In arguing for the Constitution's organization of the judicial branch, Alexander Hamilton wrote that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent,"[6] and further inferred from this precept that "[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force."[7] In Kawananakoa v. Polyblank,[8] Justice Holmes reaffirmed the doctrine of sovereign immunity "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[9]

More recently, the Supreme Court emphasized the strict requirements for a waiver of this immunity, stating that such a waiver "must be unequivocally expressed in [the] statutory

---

[4]Id.

[5]See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 437-47, (1793) (Iredell, J., tracing the doctrine of sovereign immunity forward from the time of Edward I).

[6]The Federalist No. 81, at 511 (Alexander Hamilton) (Benjamin F. Wright ed., 1961) (emphasis original).

[7]Id.

[8]205 U.S. 349, (1907).

[9]Kawananakoa v. Polyblank, 205 U.S. 349, 353, (1907).

text,"[10] and that, as stated above, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." [11] In addition, the Court has also interpreted this broad measure of protection as extending not only to more traditional governmental entities, but to all agencies of the federal government.[12]

A waiver of federal sovereign immunity can be found in one of two places: in the specific statute governing a governmental entity, or in one of the broad waivers of immunity made by Congress for certain classes of federal agencies. The Tucker Act[13] and the Contract Disputes Act [14] are examples of the latter type of waiver. In each statute, Congress explicitly waived sovereign immunity with regard to contract actions against certain federal agencies and placed jurisdiction over those actions in the United States Court of Federal Claims. However, unless these statutes specify otherwise, they apply only to agencies that operate using appropriated funds, and as a result they do not waive immunity from contract actions for allagencies.[15]

---

[10]Lane, 116 S.Ct. at 2096.

[11]Id.

[12]See, e.g., FDIC v. Meyer, 510 U.S. 471, 475, (1994).

[13]28 U.S.C.A. §§ 1491-1509 (1994 & West Supp.1997).

[14]41 U.S.C.A. §§ 601-13 (1987 & West Supp.1997).

[15]The relevant section of the United States Code states in part that "[e]very final judgement rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor...." 28 U.S.C.A. § 2517 (West Supp.1997). This provision is generally read as limiting Tucker Act claims to contracts "which could have been satisfied out of appropriated funds." Kyer v. United States,

II.

A.

In arguing that the Board is subject to a waiver of sovereign immunity, RTI first relies on the Tucker Act case of McDonald's Corp. v. United States.[16] In McDonald's, an independent contractor sued the Navy Resale and Services Support Office ("NAVRESSO"), an agency responsible for supervising certain aspects of the Navy's exchanges, for breach of contract. The Claims Court dismissed for lack of jurisdiction, stating that the Tucker Act did not expressly include NAVRESSO's predecessor agency within its waiver of sovereign immunity for the nation's military exchanges. The United States Court of Appeals for the Federal Circuit disagreed, holding that the Tucker Act's waiver of immunity included NAVRESSO because NAVRESSO's supervisory activities fell "within the ambit of 'a post exchange type of

---

177 Ct.Cl. 747, 369 F.2d 714, 718 (1966). In United States v. Hopkins, 427 U.S. 123, 96 S.Ct. 2508, 49 L.Ed.2d 361 (1976), the Supreme Court considered a contract action against the Army and Air Force Exchange Service ("AAFES"), a "nonappropriated fund instrumentality," that was brought within the scope of the Tucker Act's waiver of sovereign immunity by an express amendment, now part of 28 U.S.C. § 1491(a)(1). The Court held that the amendment was clearly designed "to afford contractors a federal forum in which to sue nonappropriated fund instrumentalities [the military exchanges] by doing away with the inequitable 'loophole' in the Tucker Act," id. at 126, 96 S.Ct. at 2510 (internal citations omitted), and affirmed jurisdiction. Nevertheless, the Court left undisturbed the general "appropriated fund instrumentality" limitation on the Tucker Act's grant of jurisdiction. As for the Contract Disputes Act, the only non-appropriated fund activities it contemplates are those "described in sections 1346 and 1491 of Title 28." 41 U.S.C.A. § 602(a) (West 1994).

[16]926 F.2d 1126 (Fed.Cir.1991).

operation.' "[17]

RTI relies upon McDonald's for the purpose of drawing a parallel. RTI argues that, just as NAVRESSO was brought within the pale of the Tucker Act's waiver of immunity for Navy exchanges because of its close association with that entity, the Board, for which there is no express statutory waiver of immunity, should be included within the waiver for the Federal Reserve banks provided by 12 U.S.C. § 341. We disagree.

McDonald's inclusion of NAVRESSO in the Tucker Act's waiver of sovereign immunity for Navy exchanges is patently distinguishable from RTI's argument that the Board should be included in the statutory waiver of immunity as to federal reserve banks. As McDonald's made clear, NAVRESSO is an entity established by the Navy itself, as well as one whose organization and function has changed as the Navy exchange system has evolved.[18] By contrast, the Board has an expressly independent statutory existence from the Federal Reserve banks it oversees. Subchapter II of 12 U.S.C. mandates the creation of the Board, and enumerates its powers,[19] which, the Board notes, primarily involve the regulation of the "member" banks of the Federal Reserve System and the establishment of general monetary policy. There is no mention of any ability to sue or be sued with regard to the Board in Subchapter II. However, separate subsequent subchapters and the sections therein deal

---

[17]McDonald's Corp. v. United States, 926 F.2d 1126, 1133 (Fed.Cir.1991) (quoting S.Rep. No. 91-259, at 2 (1969)).

[18]Id. at 1127-28.

[19]12 U.S.C.A. §§ 241-250 (1987 & West Supp.1997).

with the creation of the independent Federal Reserve banks and establish their powers, including the power "[t]o make contracts" and "[t]o sue and be sued, complain and defend, in any court of law or equity."[20]

Thus, in attempting to equate this situation with McDonald's, RTI asks us to conflate the powers of two expressly independent statutory entities. This we are unwilling to do, and therefore hold that RTI's argument is unavailing.

B.

Additionally, RTI contends that the Tucker Act's waiver of sovereign immunity should extend to the Board. RTI asserts that, because the Board's governing statutes do not explicitly preclude Congress from funding the Board in an emergency, the Board should be considered an appropriations-funded agency and thus fall within the Tucker Act's waiver. However, 12 U.S.C. § 244 clearly states that the money used to fund the Board (assessments from Federal Reserve banks) "shall not be construed to be Government funds or appropriated moneys."[21] And in any event, the only authority for the proposition that Tucker Act jurisdiction exists when Congress could appropriate money for an entity states that jurisdiction does not exist when there is "a clear expression by Congress that the agency was to be separated from general federal revenues."[22] As there is such a "clear expression" in this case, we hold that the Board is not

---

[20]Id. at § 341 (West 1987).

[21]Id. at § 244.

[22]L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982).

within the Tucker Act's waiver of sovereign immunity.

Further, even if we were to hold that there was jurisdiction under the Tucker Act, a district court in this circuit would not have jurisdiction over RTI's claim. Rather, such a claim would have to be brought in United States Court of Federal Claims. However, as we hold that the Tucker Act does not waive the Board's sovereign immunity, that question is not dispositive here.

C.

RTI alternatively argues that the Board's sovereign immunity is impliedly waived. In so doing, RTI proceeds on two grounds. First, RTI cites United States v. Winstar Corp.[23] for the proposition that sovereign immunity should not be used to frustrate the reasonable expectations of private parties who contract with the government. However, as the Board indicates in its brief, Winstar did not involve the waiver of sovereign immunity. Rather, immunity in that case had been clearly waived, and the question before the Court involved the "unmistakeability doctrine," which regards the sovereign's ability to limit its own preexisting powers.

No such "unmistakeability" question is at issue here. Additionally, although the language from Winstar regarding the reasonable expectations of private parties who deal with the government and the desirability of "the Government's credibility at the bargaining table"[24] may be compelling, it is nevertheless in direct conflict with the law's demand that there be a clear waiver of sovereign immunity. While it may be

---

[23]116 S.Ct. 2432 (1996).

[24]United States v. Winstar Corp. , 116 S.Ct. 2432, 2459 (1996).

inequitable that the Board cannot be sued on contracts into which it enters, we recognize that the determination of the propriety of this arrangement is for Congress, not for us. As Chief Justice Vinson wrote in Larson v. Domestic & Foreign Commerce Corp.:

> We do not doubt that there may be some activities of the Government which do not require such [sovereign immunity] protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress.[25]

Therefore, we find Winstar inapplicable to this case.

We are also unpersuaded by RTI's argument that an implied waiver should be found in the Board's governing statutes. In its reply brief, RTI cites a 1992 amendment to 12 U.S.C. § 248 which states that:

> The Board may act in its own name and through its own attorneys in enforcing any provision of this title, regulations promulgated hereunder, or any other law or regulation, or in any action, suit, or proceeding to which the Board is a party....[26]

This provision, RTI argues, amounts to the "functional equivalent" of a waiver of sovereign immunity in that it "recognizes that the Board can be a party to a legal action in its

---

[25]Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704- 05 (1949).

[26]12 U.S.C.A. § 248(p) (1989 & West Supp.1997).

own name."[27] Again, while this argument may be compelling, it cannot withstand the requirement that a waiver of sovereign immunity be clear, express, and unequivocal. By its very nature, an argument of implicitness or equivalence is one that comprises a recognition of the ambiguity of the matter asserted, and as such ambiguities regarding sovereign immunity must be resolved in favor of the sovereign,[28] we cannot use it as a ground for a waiver. Fidelity to the clear authority of sovereign immunity jurisprudence demands otherwise. Therefore, we hold that the Board's governing statutes do not waive the Board's immunity from suit in contract.

III.

Based on the foregoing, we hold that the district court correctly found that the Board cannot be sued in contract in federal court.[29] Accordingly, we affirm the district court's dismissal of this case.

AFFIRMED

---

[27]Appellant's Reply Br. at 4.

[28] Lane, 116 S.Ct. at 2096.

[29]Nevertheless, we also recognize, as does the Board (Appellee's Br. at 13), that the Board is not immune to certain non-contract claims, as Congress has waived the Board's immunity from suit through statutes like the Federal Tort Claims Act. See 28 U.S.C.A. § 1346(b)(1993 & West Supp.1997).

APPENDIX B- DISTRICT COURT OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED FEBRUARY 14, 1997

RESEARCH TRIANGLE INSTITUTE, Plaintiff,
v.
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, and The United States of America, Defendants.

Civil No. 1:96CV102.

United States District Court,
M.D. North Carolina,
Durham Division.

Feb. 14, 1997.

Federal contractor brought action against Board of Governors of the Federal Reserve System and the United States, seeking reimbursement for unforeseen costs incurred while performing firm fixed price contract it had entered with Board. United States and Board filed motion to dismiss. The District Court, Bullock, Chief Judge, held that sovereign immunity barred action.

Motion granted.

Robinson O. Everett, Everett & Everett, Durham, NC, Grace C. Boddie, Research Triangle Institute, Research Triangle Park, NC, for plaintiff.

Bradford S. Fleetwood, Washington, DC, for Bd. of Governors of the Federal Reserve System.

Gill P. Beck, Office of U.S. Attorney, Greensboro, NC, for defendant U.S.

MEMORANDUM OPINION

BULLOCK, Chief Judge.

Plaintiff Research Triangle Institute ("RTI") filed this action against the Board of Governors of the Federal Reserve System ("Board") and the United States of America seeking reimbursement for unforeseen costs Plaintiff incurred while performing a firm fixed price contract it entered with the Board. This matter is now before the court on Defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth hereafter, the court will grant Defendants' motion to dismiss for lack of subject matter jurisdiction, making it unnecessary to consider whether Plaintiff has stated a claim upon which relief can be granted.

FACTS

The Board is a seven member federal agency established under the Federal Reserve Act, 12 U.S.C. § 221 et seq., to supervise and regulate the banks that comprise the Federal Reserve System. On November 3, 1987, the Board issued a Request for Proposal ("RFP") to solicit bids for a survey to determine the institutional sources and geographic areas from which small businesses obtain financial services. The RFP contained performance specifications and a suggested survey design for conducting interviews of selected small businesses.

Plaintiff RTI, a non-profit corporation organized by the University of North Carolina at Chapel Hill, Duke University,

and North Carolina State University to examine complex research issues in various scientific, technical, and social subjects, was one of the bidders that submitted a proposal to the Board. On February 2, 1988, the Board awarded Plaintiff a firm fixed price contract for $572,763 to conduct the research survey.[1] This contract was awarded to Plaintiff based on its cost proposal as well as its 29 years of contract research experience. Plaintiff completed the survey in September 1989 but was unable to meet the targets included in the contract's performance specifications. Nonetheless, the Board paid Plaintiff the full contract price.

Prior to the completion of the contract, Plaintiff submitted a written request on May 24, 1989, to the Board's contracting officer for an equitable adjustment of $284,079. After this request was denied, Plaintiff unsuccessfully appealed the decision to the Board. The equitable adjustment request now serves as the basis for the action before this court. Defendants maintain that this court does not have subject matter jurisdiction to hear this dispute because of the sovereign immunity doctrine. Defendants also contend that Plaintiff assumed the risk of any unanticipated costs after agreeing to a firm fixed price contract. Finally, Defendants assert that all of the changes in the contract for which Plaintiff now seeks compensation were accounted for in the contract modifications agreed to by both parties.

---

[1]Although the original contract price was $572,763, four modifications to the contract increased the price to $615,851. The modifications increased the length of each interview, increased the number of questions and interviews, allowed the Board to work closely with RTI in developing the questionnaire, eliminated some of the performance specifications, and extended the contract deadline.

DISCUSSION

In an action against the United States or one of its agencies, a federal court may not exercise jurisdiction absent a clear waiver of sovereign immunity. Federal Deposit Insurance Co. v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 1000, 127 L.Ed.2d 308 (1994); United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351-52, 63 L.Ed.2d 607 (1980). A waiver of immunity must be unequivocally expressed by Congress in the statutory text and "will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 518 U.S. 187, ----, 116 S.Ct. 2092, 2096, 135 L.Ed.2d 486 (1996). The party bringing suit against the federal government or its agencies bears the burden of directing the court to such a clear and explicit waiver. Williams v. United States, 50 F.3d 299, 304 (4th Cir.1995).

In this case, therefore, the court begins its analysis with the premise that sovereign immunity shields the United States and the Board from suit. Congress has waived sovereign immunity for some contract claims against the federal government and its agencies under the Tucker Act, 28 U.S.C. § 1491, and the Contract Disputes Act ("CDA"), 41 U.S.C. § 601 et seq. However, as Plaintiff correctly notes, neither of these statutes applies to the Board. Under both the Tucker Act and the CDA, Congress has restricted the Federal Claims Courts' jurisdiction to contractual obligations paid out of appropriated funds with certain limited exceptions.[2] Because

---

[2]Under 28 U.S.C. § 2517(a), judgments rendered by the United States Courts of Federal Claims must be paid out of appropriated funds. Thus, with the exception of military exchanges pursuant to amendment, the Tucker Act only waives sovereign immunity for contract actions that may obligate appropriated funds. McDonald's Corp. v. United States, 926 F.2d 1126, 1129 (Fed.Cir.1991); see also United States v. Hopkins, 427 U.S. 123, 126, 96 S.Ct. 2508, 2510-11, 49 L.Ed.2d 361 (1976) (recognizing that

Congress has provided that the Board's funds "shall not be construed to be Government funds or appropriated moneys," 12 U.S.C. § 244, [3] these statutes would act as a waiver of the Board's immunity only if the Board fell within the narrow class of exceptions. The limited exceptions in which Congress has waived sovereign immunity for contractual obligations paid out of nonappropriated funds, however, include only the military exchanges enumerated in section 1491(a)(1) of the Tucker Act. Thus, Congress did not expressly waive the Board's sovereign immunity in the Tucker Act or the CDA.

Although the Board does not fall within the jurisdiction of either the Tucker Act or the CDA, Plaintiff contends that it is unnecessary for this court to shield NAFI's from suit under the sovereign immunity doctrine because these entities would not expend public money to satisfy judgments awarded against them. With regard to whether immunity is needed to protect the Board, the Supreme Court has recognized that "it is not for this Court to examine the necessity in each case. That is a function of Congress." Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704, 69 S.Ct. 1457, 1468, 93 L.Ed. 1628 (1949).

An examination of the legislative history surrounding the

---

the purpose of the 1970 amendment to the Tucker Act was to provide a remedy to those who contract with the nonappropriated fund instrumentalities ("NAFI") listed in 28 U.S.C. § 1491). In the CDA, Congress elected to limit jurisdiction over NAFI's in the Federal Claims courts to the extent allowed under the Tucker Act. See 41 U.S.C. § 602(a).

[3]A federal agency that does not receive money by congressional appropriation is classified as a NAFI. Hopkins, 427 U.S. at 125 n. 2, 96 S.Ct. at 2510 n. 2.

1970 amendment to the Tucker Act indicates that Congress did not intend to waive sovereign immunity in all contract actions involving NAFI's. The House Judiciary Committee rejected such a proposal because "the complete removal of sovereign immunity for all non-appropriated fund activities would be undesirable." H.R.Rep. No. 933, 91st Cong., 2d Sess. 1-5 (1969), reprinted in, 1970 U.S.C.C.A.N. 3477, 3477-79. Accordingly, Congress did not waive sovereign immunity in contract actions involving the Board, a NAFI not expressly enumerated in the amendment to the Tucker Act. See Wolverine Supply, Inc. v. United States, 17 Cl.Ct. 190, 192-93 n. 4 (1989) ("An analysis of the complete legislative history of the 1970 amendment to 28 U.S.C. § 1491 makes it clear that Congress intended that sovereign immunity was to remain as to all nonappropriated fund instrumentalities except for military exchanges....").

Because Congress did not intend to waive sovereign immunity in all contract claims against NAFI's under either the Tucker Act or the CDA, this court must apply the sovereign immunity doctrine unless Plaintiff is able to direct the court to an unequivocal waiver of the Board's immunity by Congress.[4] In this case, Plaintiff has failed to bring such a

---

[4]Plaintiff asserts that the General Counsel to the Board waived the sovereign immunity defense in a May 15, 1990, letter to RTI stating that "[i]f you wish to pursue your claim, you may file a complaint with the appropriate federal district court." (Pl.'s Br. Opp'n to Mot. to Dismiss Ex. P.) However, "[i]t is well established that the United States cannot be sued without its specific statutory consent and that no government officer by his action can confer jurisdiction otherwise lacking." Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680, 687 (7th Cir.1980). See also Wolverine Supply, 17 Cl.Ct. at 193 n. 7 (noting that a contracting officer did not have authority to waive congressional limitations on the court's jurisdiction). Thus, this statement is insufficient to waive the Board's sovereign immunity.

waiver to the court's attention.

Plaintiff contends that federal question jurisdiction is proper in this court based on 28 U.S.C. § 1331 and 12 U.S.C. § 632. However, neither of these provisions unequivocally waives sovereign immunity in contract actions against the federal government and its agencies. First, with regard to 28 U.S.C. § 1331, "[t]he federal question jurisdictional statute is not a general waiver of sovereign immunity; it merely establishes a subject matter that is within the competence of federal courts to entertain." Whittle v. United States, 7 F.3d 1259, 1262 (6th Cir.1993). Second, 12 U.S.C. § 632 cannot provide a basis for federal question jurisdiction because the statute grants federal district courts original jurisdiction only in suits to which any Federal Reserve Bank is a party. Here, Plaintiff has instituted its action against the Board, an entity clearly separate from the Federal Reserve Banks ("Banks").

Plaintiff argues that its contract with the Board is, in essence, a contract with the collective Banks subject to 12 U.S.C. § 632. Plaintiff comes to this conclusion by reasoning that the Board acts as an agent for the Banks by committing funds of the twelve Banks when it executes contracts. See id. § 243 (authorizing the Board to levy assessments upon the Banks to pay expenses). However, the Federal Reserve Act clearly contemplates treating the Board and the Banks as distinct entities by defining them separately. Id. § 221. Furthermore, Congress explicitly waived sovereign immunity for the Banks by providing "sue and be sued" authority when outlining the Banks' powers. Id. § 341. When enumerating the powers and authority of the Board, by contrast, Congress did not provide any similar language. See id. § 248. Consequently, Plaintiff's

attempt to include the Board in the congressional waiver of the Banks' sovereign immunity is without merit, and this court does not have subject matter jurisdiction over the Board.

CONCLUSION

For the reasons stated above, the court will grant Defendants' motion to dismiss for lack of subject matter jurisdiction.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

ORDER

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Defendants' motion to dismiss [# 5] is GRANTED, and this civil action be, and the same hereby is, DISMISSED.